have taken a different position. They have concluded that Section 7502 does not displace the common-law mailbox rule completely. Instead, those courts hold that the mailbox rule's presumption applies to documents subject to Section 7502, but only if the taxpayer provides "proof of postmark," and not "mere evidence of mailing." *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1161 (8th Cir. 1990); see *Anderson* v. *United States*, 966 F.2d 487, 491 (9th Cir. 1992) (expressly following *Estate of Wood*); see also *Lewis* v. *United States*, 144 F.3d 1220, 1223 (9th Cir. 1998) (requiring "credible evidence of the date [the] letter * * * was postmarked").[1]

In this case, petitioners assert that they mailed their tax claim in March of 1998. Petitioners acknowledge that they did not use certified or registered mail. Pet. 8. Therefore, as Judge Hartz concluded (Pet. App. 22), petitioners could not rely on the mailbox rule under the Second and Sixth Circuits' rule. Nor, as Judge Baldock concluded, were petitioners entitled to a presumption of delivery under the Eighth and Ninth Circuits' view. As Judge Baldock explained, petitioners did not present any credible evidence regarding the date on which the documents were postmarked. Pet. App. 18. Accordingly, petitioners would not be entitled to a presumption of deliv-

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7502(a)(1). The second exception, Section 7502(c), provides a method to guard against the risk of non-delivery. It states that a receipt for a document sent by registered (or, under 26 C.F.R. 301.7502-1(c)(2), certified) mail is to be treated as "prima facie evidence" of delivery and that the date of registration (or certification) shall be treated as the date of delivery. 26 U.S.C. 7502(c)(1) and (2). No such presumption of delivery attaches, however, when a document is sent by regular mail.

[1] No court of appeals has adopted the theory in Judge Seymour's dissent (Pet. App. 22-24) that, after the enactment of Section 7502, the taxpayer's self-serving assertion of the timely mailing of tax documents alone is sufficient to raise the presumption of timely delivery.

ery under either the Second and Sixth Circuits' view or the Eighth and Ninth Circuits' view. To be sure, petitioners dispute Judge Baldock's conclusion, arguing that they did produce adequate credible evidence of the date of postmark, but that fact-bound contention does not warrant this Court's attention.

b. There is no merit to petitioners' contention (Pet. 11-12) that the court of appeals' decision conflicts with this Court's decisions in *Rosenthal* v. *Walker*, 111 U.S. 185 (1884), and *Hagner* v. *United States*, 285 U.S. 427 (1932), the Ninth Circuit's decision in *Schikore* v. *BankAmerica Supp. Ret. Plan*, 269 F.3d 956 (2001), or the Seventh Circuit's decision *Godfrey* v. *United States*, 997 F.2d 335 (1993). None of those cases involved Section 7502, much less its effect on the mailbox rule. Accordingly, the court of appeals' conclusion that the mailbox rule does not apply in this case does not warrant further review.

2. Review is also inappropriate because of ongoing administrative efforts to bring further clarity to this area of the law. The IRS has recently issued proposed regulations to provide "specific guidance" regarding the proof needed to establish that a tax document was delivered. See *Timely Mailing Treated as Timely Filing*, 69 Fed. Reg. 56,377 (2004).[3] The proposed regulations clarify that, other than direct proof of actual delivery, a registered or certified mail receipt is the only *prima facie* evidence of delivery of documents that have a filing deadline prescribed by the tax laws. See *id.* at 56,378. Because the proposed regulations will likely eliminate any dispute about the application of the common-law mailbox

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[3] The comment period expired December 20, 2004 (69 Fed. Reg. at 56,378), and a public hearing was held on January 11, 2005.

rule to documents subject to Section 7502, further review of the question presented in this case is not warranted. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2005